

Aug 11, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PHILIP A. DUGGAN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 2:16-CV-0034-SMJ

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT, GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT,
GRANTING IN PART AND
DENYING IN PART ECF NO. 78,
AND GRANTING ECF NO. 82**

Before the Court, without oral argument, are the parties' cross motions for summary judgment. ECF Nos. 48 & 53. Each party moves for an order from this Court granting it a favorable decision on the remaining claims in this case—counts three through seven. ECF Nos. 48 & 53. Having reviewed the pleadings and the entire file in this matter, including numerous filings on the instant motions, the Court is fully informed and for the reasons detailed below denies Plaintiff's motions and grants the United States' motion.

I. BACKGROUND

This case concerns a dispute between Plaintiff Duggan and Defendant the United States of America over penalties assessed against Duggan for allegedly

1 filing frivolous tax returns to the Internal Revenue Service (IRS). *See generally* ECF
2 No. 1. Specifically, Duggan alleges that, pursuant to 26 U.S.C. § 6702, the IRS
3 incorrectly assessed and imposed penalties against him for filing frivolous tax
4 submissions. ECF No. 1 at 3. He filed suit asking “for reallocation and then, if
5 applicable, refund of taxes taken through levy and erroneously applied to defective,
6 improperly or otherwise unjustly assessed penalties.” ECF No. 1 at 1. Duggan’s
7 complaint lists thirteen separate counts identifying payments he made toward
8 penalties he asserts were incorrectly assessed and imposed against him. *Id.* at 18–
9 35. Following a motion to dismiss filed by the United States, ECF No. 6, the Court
10 dismissed counts eight through thirteen because the Court lacked subject-matter
11 jurisdiction over those claims. ECF No. 22. Subsequently, the United States filed
12 another motion which challenged the Court’s subject-matter jurisdiction as to
13 counts one and two. ECF No. 43. The Court granted that motion and affirmed its
14 decision following Duggan’s motion for reconsideration. ECF Nos. 47 and 89.

15 Now, each party urges the Court to grant it summary judgment on the
16 remaining counts. ECF Nos. 48 and 53. Counts three through seven of the complaint
17 are very similar. ECF No. 1 at 20–26. In each count Duggan alleges that he
18 erroneously paid penalties and interest to satisfy defectively assessed penalties
19 pursuant to 26 U.S.C. § 6702 and confirmed payment for each in a Form 843. ECF
20 No. 1 at 20–26. However, each individual count in three through seven alleges that

1 the payments were made at different time periods. ECF No. 1 at 20–26. Duggan
2 also alleges that he has exhausted his administrative remedies for each count. ECF
3 No. 1 at 20–26.

4 Following the parties’ extensive briefing of the summary judgment motions,
5 the parties filed two motions that the Court also addresses in this order: (1)
6 Duggan’s Motion for Leave to File Addendum to Plaintiff’s Response to United
7 States of America’s Motion for Summary Judgment and to Shorten Time, ECF No.
8 78; and (2) the United States of America’s Motion to Strike Affidavit, ECF No. 82.
9 These motions pertain to information the Court could take into account in deciding
10 the summary judgment motions, and therefore the Court rules on them before
11 addressing the merits of the motions for summary judgment.

12 **A. Duggan’s Motion for Leave to File Addendum to Plaintiff’s response to**
13 **United States of America’s Motion for Summary Judgment and to**
Shorten Time is denied in part and granted in part.

14 Through this motion Plaintiff Duggan seeks leave to file an addendum to his
15 response to the United States’ summary judgment motion to “correct a statement
16 and an important form number error.” ECF No. 78 at 1. He also seeks to respond to
17 two case cites and add a relevant case cite of his own. Id. at 2. The United States
18 opposes the request arguing that it would be prejudiced as it has already fully briefed
19 the summary judgment motions and that it would not have the opportunity to
20 respond to any new allegations raised by the Plaintiff. ECF No. 81.

1 The Court has fully reviewed the issue and agrees that the United States
2 would be prejudiced by new information or arguments Duggan raises in the
3 proposed addendum. However, to the extent he seeks to correct information
4 contained within his previous filing at ECF No. 67, to which the United States has
5 already responded, the Court considers that information. The Court does not,
6 however, consider new information since the underlying summary judgment
7 motions have already been fully briefed. Accordingly, Duggan's motion, ECF No.
8 78, is granted in part and denied in part.

9 **B. The United States of America's Motion to Strike Affidavit is granted.**

10 The United States moves the Court to strike the affidavit, ECF No. 80,
11 Duggan submitted in support of his motion for summary judgment. ECF No. 82.
12 The United States objects to this filing as untimely because Duggan's motion for
13 summary judgment has been fully briefed and considering the affidavit would
14 prejudice the United States as it would not be allowed to respond. ECF No. 82 at 2.

15 Duggan opposes the motion to strike asserting that the prejudice to the United
16 State would be minimal and that he submitted the affidavit because there had been
17 no ruling on his summary judgment motion as of July 13, 2017. ECF No. 87 at 2.
18 He further asserts that the briefing of his summary judgment motion was not
19 complete until his affidavit was submitted. ECF No. 87 at 3. Duggan maintains that
20

1 the affidavit serves the interests of justice because it “[clarifies] to the Court without
2 introducing any facts. ECF No. 87 at 3.

3 The Court notes that Duggan did not seek leave to file this affidavit. Even
4 assuming that he had sought leave, considering Duggan’s additional affidavit at this
5 late stage would prejudice the United States. First, the Local Rules specify how
6 summary judgment motions are to be briefed. *See* Local Rules 7.1 and 56.1.
7 Supporting affidavits must be submitted with motions, responses, and replies, when
8 a party makes factual assertions. Local Rule 7.1(g). Absent some compelling
9 reason, there really is no need for a party to submit additional filings to the ones
10 contemplated in the rules. Here, Duggan offers no compelling reason for allowing
11 an additional filing.

12 Secondly, and perhaps more importantly, allowing Duggan to file an affidavit
13 at this point would prejudice the United States because it would not have the
14 opportunity to respond to Duggan’s affidavit. Furthermore, Duggan’s summary
15 judgment motion has already been completely briefed: (1) Duggan filed his motion
16 for summary judgment on April 4, 2017, ECF No. 48; (2) the United States filed its
17 response on April 24, 2017, ECF No. 55; and (3) Duggan filed his reply on May 15,
18 2017, ECF No. 63. Duggan was afforded every opportunity to present his case to
19 the Court relating to the issues raised in his summary judgment motion. *See* Local
20 rules 7.1 and 56.1 (detailing the procedures for briefing summary judgment motions

1 in particular and memoranda in general). Accordingly, the Court grants the United
2 States Motion to Strike, ECF No. 82.

3 **II. LEGAL STANDARD**

4 Summary judgment is appropriate if the “movant shows that there is no
5 genuine dispute as to any material fact and the movant is entitled to judgment as a
6 matter of law.” Fed. R. Civ. P. 56(a). Once a party has moved for summary
7 judgment, the opposing party must point to specific facts establishing that there is
8 a genuine dispute for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If
9 the nonmoving party fails to make such a showing for any of the elements
10 essential to its case for which it bears the burden of proof, the trial court should
11 grant the summary judgment motion. *Id.* at 322. “When the moving party has
12 carried its burden under Rule [56(a)], its opponent must do more than simply
13 show that there is some metaphysical doubt as to the material facts. . . . [T]he
14 nonmoving party must come forward with ‘specific facts showing that there is a
15 genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
16 U.S. 574, 586–87 (1986) (internal citation omitted). When considering a motion
17 for summary judgment, the Court does not weigh the evidence or assess
18 credibility; instead, “[t]he evidence of the non-movant is to be believed, and all
19 justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby,*
20 *Inc.*, 477 U.S. 242, 255 (1986).

III. DISCUSSION

A. Duggan’s administrative claim relating to counts three through seven of the complaint only questioned whether the IRS had complied with 26 U.S.C. § 6751(b)(1), rendering that the only ground for a refund that the Court may consider.

It is well settled that a plaintiff seeking a tax refund through a lawsuit in federal court must first file an administrative claim with the IRS. *Boyd v. United States*, 762 F.2d 1369, 1371–72 (9th Cir. 1985) (citing 26 U.S.C. § 7422(a) and implementing regulations). Such a claim “must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof.” *Id.* at 1371 (citation and quotation marks omitted). “If the claim on its face does not call for investigation of a question, the taxpayer may not later raise that question in a refund suit.” *Id.* at 1372.

The administrative claims Duggan filed seeking refund for each of the penalties at issue in counts three through seven contain a Form 843 seeking refund and an appended a letter in which he explained, among other things, “[a]lthough I have a number of good reasons to request abatement for reasonable cause for a number of penalties it is not necessary here because I’ve determined that IRS made an error and is deficient in procedure and were not in compliance with § 6751(b)(1) for assessment.” ECF No. 1-1 at 34–35 (discussing penalties paid in 2000 which are the subject of count 3); *see also* ECF No. 1-1 at 49–51, 65–66,

1 78–79 and 91–92 (additional Forms 843 and attached letters explaining, using
2 slightly different language, that he was only raising procedural challenges to the
3 penalties assessed against him). The rest of these letters, which are all very
4 similar, go on to explain the steps Duggan took to raise and point out the alleged
5 procedural deficiencies in how these penalties were assessed against him to IRS
6 personnel. *Id.*

7 In this lawsuit, however, Duggan maintains that he “requests penalty
8 abatement . . . or other code sections and/or that were otherwise unjust . . . or for
9 reasonable cause . . . or equity considerations applicable to the individual
10 penalty.” ECF No. 67 at 2. He also alleges that his due process rights were
11 violated and seeks redress for that. *Id.* Yet, as *Boyd* makes clear, Duggan can only
12 raise the issue he identified in his administrative claims—the alleged procedural
13 deficiencies Duggan maintains IRS committed in assessing the penalties at issue
14 here. The Court has reviewed all the filings in this case and recognizes Duggan’s
15 many efforts to challenge what he perceives to be unfair treatment. However, at
16 this stage in his challenge to the IRS’s action, the only issue properly before the
17 Court is the one he raised in this administrative claims—whether the IRS followed
18 the proper procedures in issuing penalties against Duggan.

1 **B. The penalties the IRS assessed against Duggan were procedurally**
2 **appropriate.**

3 Courts have repeatedly held that Certificates of Assessments and Payments
4 are “sufficient evidence that an assessment was made in the manner prescribed by
5 [26 U.S.C. §] 6203 and” implementing regulations. *Long v. United States*, 972
6 F.2d 1174, 1181 (10th Cir. 1992); *United States v. Dubey*, CV-S-94-0417, 1997
7 U.S. Dist. LEXIS 4904, at *13 (E.D. Cal. March 21, 1997) (“The introduction of
8 Certificates of Assessments and Payments into evidence is sufficient to create a
9 presumption that the assessments were validly made and the proper notice and
10 demand were issued and were given to the taxpayer on the dates recorded on the
11 certificate.”); *Dallin v. United States*, 62 Fed. Cl. 589, 600–01 (2004) (“It is well
12 established that a certified copy of the taxpayer’s Form 4340 triggers the
13 presumption of correctness in favor of the government, and is ‘routinely used to
14 prove that a tax assessment has in fact been made.’”); *Simmons v. United States*,
15 127 Fed. Cl. 153, 160 (2016).

16 Here, the United States has provided Certificate of Assessments, Payments,
17 and Other Specified Matters on Form 4340 for each of the penalties at issue in
18 counts three through seven. ECF Nos. 54-1 (Declaration of Shauna Henline) and
19 54-2 at Ex. A. Accordingly, the United States has established that the penalties
20 assessed against Duggan were presumptively valid. *Decker v. United States*, No.
C08-1339, 2009 WL 1455327, at *4 (W.D. Wash. May 20, 2009) (dismissing a

1 claim for failure to comply with the procedural requirements of 26 U.S.C. §
2 6751(b) because a submitted Form 4340 was prima facie evidence that the
3 assessments at issue there were made correctly).

4 Therefore, for Duggan's claims to survive, he must demonstrate that an
5 issue of material fact as to the remaining counts persists in light of the evidence
6 submitted by the United States. Duggan attempts to distinguish his case from the
7 case law holding that a Form 4340 establishes a presumption for the propriety of
8 the IRS's liabilities assessment against a tax payer by pointing out that those cases
9 reference other portions of the relevant statute. ECF No. 67 at 7–11. That is
10 unavailing because the issue here is clearly settled—a Form 4340 establishes a
11 presumption that IRS action was proper.

12 Further, Duggan asserts that he has rebutted the United States' evidence in
13 its statement of material facts and supporting declarations and exhibits, ECF Nos.
14 54, 54-1, and 54-2, "point for point." ECF No. 67 at 10. Duggan's declaration at
15 ECF No. 65, in which he asserts that he refutes the facts presented by the United
16 States in Shauna Henline's declaration and supporting exhibits, does not establish
17 facts. It mostly contains Duggan's views on the points Heinlein made in her
18 declaration and the issues raised in her declaration and supporting documents.
19 This does not create a genuine issue of material fact. *See generally* ECF No. 65.

1 Duggan also seems to argue that even if the assessed penalties were in
2 compliance, that does not necessarily mean that they are lawful. *See, e.g.*, ECF
3 No. 63 at 5 (“Even if a penalty is technically in compliance with § 6751 it does
4 not prove it lawful, just or that it was [Duggan’s] filing.”). It is unclear to the
5 Court what legal basis Duggan relies on to make such assertions. As discussed
6 above, courts have routinely held that Form 4340 presumptively establishes that
7 the IRS has acted properly. The Court is unaware of any other procedural
8 requirements that the IRS had to adhere to in this case.

9 To the extent that Duggan argues that the United States erred by pointing
10 this Court to unpublished cases without providing Duggan a photocopy of such
11 unpublished cases, the Court does not read Local Rule 7.1(f)(3) as narrowly as
12 Duggan. Westlaw and LexisNexis are publicly available, though subscription
13 based, electronic databases. Accordingly, the Court does not believe that noting
14 unpublished cases is in error. The Court notes, however, that Duggan could have
15 requested the cases from opposing counsel, either directly or, if necessary, by
16 filing a motion with the Court as soon as practicable after receiving a brief from
17 the United States including such citations.

18 Lastly, the Court notes that it has considered all other arguments and filings
19 by the parties. However, they are immaterial and do not establish issues of
20 material fact that preserve counts three through seven.

1 **IV. CONCLUSION**

2 For the reasons detailed above, the Court grants the United States motion
3 for summary judgment and denies Duggan's motion.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 **1.** Plaintiff's Motion for Leave to File Addendum to Plaintiff's Response
6 to United States of America's Motion for Summary Judgment and to
7 Shorten Time, **ECF No. 78**, is **GRANTED IN PART** and **DENIED**
8 **IN PART.**


9 **2.** Defendant's Motion to Strike Affidavit, **ECF No. 82**, is **GRANTED.**

10 **3.** Plaintiff's Motion for Summary Judgment for Counts Three Through
11 Seven of the Complaint, **ECF No. 48**, is **DENIED.**

12 **4.** Defendant's Motion for Summary Judgment, **ECF No. 53**, is
13 **GRANTED.**

14 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
15 provide copies to all counsel and pro se Plaintiff.

16 **DATED** this 11th day of August 2017.

17 
18 SALVADOR MENDEZ, JR.
19 United States District Judge
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